

**Judicial Review and Merits Review:
Comparing Administrative Adjudication by Courts and Tribunals**

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1. Introduction

This paper is about administrative adjudication, which for present purposes can be defined in terms of the resolution of disputes between citizen¹ and government by means of reviewing decisions of government officials and agencies. There are (I suggest) two modes of administrative adjudication: judicial review and (adopting the Australian term) merits review. Judicial review, as its name implies, is conducted by (traditional) courts. Merits review is conducted by bodies that are commonly (although not universally) referred to – in the common law world outside the US, anyway – as (administrative) ‘tribunals’. The term ‘tribunal’ is used in various senses; but for present purposes, it suffices to define a tribunal as an adjudicatory body that is not a court. In the US the equivalent institution is the independent or executive agency and, in particular, officials within agencies whose allotted task is (formal) adjudication in the sense in which that term is used in the Administrative Procedure Act 1946 (APA). Such officials are known as administrative law judges (ALJs) and administrative judges (AJs) – the former, unlike the latter, being appointed under the APA. For convenience, I will often use the term ‘tribunal’ to refer to such officials as well.

It will be immediately obvious that whereas the term ‘judicial review’ expressly refers to the institution that conducts the review, the term ‘merits review’, by contrast, refers to the basis of review. However, the former also implicitly refers to a set of grounds of review that define its basis; and it is with the basis or grounds of the two modes of review that this paper is primarily concerned. In other words, the paper is about the juridical nature of judicial review and merits review respectively. The paper is comparative in two dimensions: first, it

¹ Or, as often in the case of immigration disputes, non-citizen.

compares the two modes of review, and secondly it compares the two modes of review in three jurisdictions – the US, the UK and Australia.

The jurisdictional comparison will pivot on Australia for two main reasons. First, understanding administrative adjudication requires an analysis of its constitutional foundations; and Australian federal constitutional law is a complex amalgam of British and American elements. Secondly, the concept of ‘merits review’ – in the sense of the mode of administrative adjudication conducted by non-courts – has a complex and highly developed technical meaning in Australian law that it lacks in the law of either the US or the UK. As a result, a much more sophisticated understanding of the juridical nature of ‘non-judicial’ review can be gained by analysing Australian law than by studying the law of either the US or the UK.²

Outside Australia, there is surprisingly little literature about the nature of non-judicial review. Administrative lawyers in all three of our comparator jurisdictions tend to focus on judicial review and to marginalise tribunals and merits review. Discussion of tribunals tends to be concerned primarily with issues such as procedure and independence. It is generally acknowledged that tribunals are of great practical significance, if only because they resolve many more disputes between citizen and government than do courts; but they are rarely considered to be of much theoretical interest. This is partly because of the high status and the constitutional significance of courts; and partly because of the fact that in the US and the UK tribunals are commonly (but often unthinkingly) thought of as performing an essentially similar function to that of courts. In Australia, by contrast, tribunals are understood to be essentially different institutions from courts and to perform an essentially different function than courts. In fact – as we will see – in Australian law there are significant similarities

² The most comprehensive account of merits review in Australia is D Pearce, *Administrative Appeals Tribunal*, 2nd edn (LexisNexis Butterworths Australia, 2007). The research on which this paper is based was generously funded by the Australian Research Council. It draws on material in P Cane, *Administrative Tribunals and Adjudication* (Oxford: Hart Publishing, 2009), forthcoming.

between the two modes of administrative adjudication; and in US and UK law there are, arguably, significant differences between them. Exploring such similarities and difference is a major aim of this paper.

The remainder of the paper is divided into four sections. Section 2 examines the development and meaning of the Australian concept of merits review. Sections 3 and 4 deal with the position in the UK and the US respectively, and section 5 draws together the discussion in the previous three sections and suggests that the characteristic function of tribunals in all three of our comparator jurisdictions is intense review of bureaucratic fact-finding.

2. Australia

2.1 The Development of Merits Review

Like much else, Australia borrowed the basic model of the administrative tribunal from England. The model administrative tribunal is a free-standing adjudicatory body that reviews decisions, made by the executive branch of government, which adversely affect citizens.

Unlike the English constitution, however, the Constitution of the Commonwealth of Australia (the federal level of government) is contained in a single document and embodies, like the US Constitution, a formal separation of powers: Chapter I deals with the legislature, Chapter II with the executive and Chapter III with the judiciary. However, the Constitution also establishes a system of responsible government in which ministers of state are required to be members of parliament (s 64); and for historical and pragmatic reasons, delegation of legislative power to the executive has been held to be consistent with the Constitution.³ On the other hand, the Constitution has been interpreted as requiring a rather strict separation of judicial power. The ‘dominant principle of demarcation’⁴ is that only Chapter III courts can

³ *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.

⁴ *New South Wales v The Commonwealth* (the ‘Wheat case’) (1915) 20 CLR 54, 90 (Isaacs J)

exercise judicial power, and that Chapter III courts cannot perform non-judicial functions except those that are incidental to the exercise of judicial power.⁵

In a series of cases in the 1920s – commonly called ‘the taxation cases’⁶ – the High Court of Australia (and the English Privy Council on appeal from the High Court) were confronted by challenges to the constitutionality of the system for adjudicating disputes between taxpayers and the tax authorities. Taxpayers were originally given the choice of challenging determinations of the Commissioner of Taxation either in a Chapter III court or before a Taxation Board of Appeal, which was not a Chapter III court. Various features of this arrangement – such as the fact that there was a right of appeal from the Board to the High Court in its *appellate* jurisdiction – were held by the High Court to involve unconstitutional conferment of judicial power on the Board of Appeal. The relevant legislation was subsequently amended to replace the Board of Appeal with a Board of Review. Critical features of the new arrangement were that in reviewing determinations of the Commissioner, the Board was expressed to have ‘all the powers and functions’ of the Commissioner, and the decision of the Board was deemed to be a decision of the Commissioner. Partly on this basis, it was held by both the High Court and the Privy Council that in adjudicating disputes between taxpayers and the Commissioner, the Board of Review was exercising non-judicial power with which, being a non-judicial body, it was validly invested.

Perhaps the chief significance of the taxation cases was that they cleared the way for the use of non-judicial tribunals to adjudicate disputes between citizen and government, thus providing much-needed supplementation of the relatively meagre adjudicatory resources available in the then-existing Chapter III courts. As acknowledged by Isaacs J who was,

⁵ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; affirmed on appeal by the Privy Council: *Attorney-General (Commonwealth) v R; Ex parte Boilermakers' Society of Australia* (1957) 95 CLR 529.

⁶ *British Imperial Oil Co Ltd v Commissioner of Taxation* (1925) 35 CLR 422; *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153; *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530.

ironically, the chief architect of the dominant principle of demarcation,⁷ the rapid growth of government involvement in economic and social life in the early 20th century (coupled with an unwillingness to swell the ranks of the Chapter III judiciary by creating new courts) made recognition of the constitutionality of arrangements for non-judicial administrative adjudication a practical necessity.⁸

The decisions in the taxation cases were based on the principle that judicial functions cannot be conferred on non-judicial bodies. The corollary (and more controversial) principle, that non-judicial functions cannot be conferred on judicial bodies unless incidental to the exercise of judicial power, was not established until 1957.⁹ The latter principle underpinned reasoning central to the 1971 Report of the Commonwealth Administrative Review Committee (the ‘Kerr Committee’).¹⁰ The Committee was established primarily to consider a proposal for a new federal court to review ‘administrative decisions’. Its recommendations in this regard led to the creation of the Federal Court of Australia in 1976 and the enactment of the Administrative Decisions (Judicial Review) Act 1976, which created a statutory regime of judicial review alongside the existing common law regime. However, the Committee also considered that because judicial review was concerned only with the ‘legality’ of administrative decisions, it needed to be supplemented by general provision for review of decisions ‘on the merits’. In the Committee’s opinion, reviewing the merits of administrative decisions (as opposed to their legality) would typically involve the exercise of non-judicial power. It followed that the merits review function could not be conferred on a judicial body. The Committee therefore recommended the creation of a (non-judicial) general administrative appeals tribunal on which would be conferred power to review the ‘merits’ of a wide range of administrative decisions. Although the Committee did not explicitly

⁷ See n 2 above

⁸ See particularly Isaacs J’s judgment in *Federal Commissioner of Taxation v Munro*.

⁹ See n 3 above.

¹⁰ Parliamentary Paper No 144 of 1971.

recognise the fact, it had invented a new adjudicatory function – merits review – which, being a non-judicial, was to be understood as categorically different from judicial review, a judicial function.

The model adopted for the Administrative Appeals Tribunal (AAT) was that of the Taxation Board of Review, approved by the High Court and the Privy Council 50 years earlier. On review, the AAT has the power to affirm or vary a decision or to set it aside and make a substitute decision or remit it to the decision-maker for reconsideration.¹¹ The AAT ‘may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision’; and when the AAT varies a decision or makes a substitute decision, its decision is deemed to be the decision of the original decision-maker. Out of these sparse provisions the AAT and the Federal Court have developed a complex concept of merits review that describes the main function of the AAT and other federal administrative tribunals that operate in areas such as social security and immigration. The AAT exercises a mix of first-tier and second-tier merits review jurisdiction. The former involves reviewing decisions of bureaucrats and the latter involves reviewing (on their merits) decisions of first-tier (merits review) tribunals (such as social security appeal tribunals but not, notably, immigration tribunals). Decisions of the AAT can be appealed to the Federal Court on a point of law, and the AAT is subject, in theory at least, to judicial review by the Federal Court.

The extent to which the concept of merits review has taken on a life of its own is witnessed by its adoption in the Australian states. Unlike the Commonwealth Constitution, the constitutions of the states do not embody a formal separation of powers. As a result, there is, in principle, no bar to the conferral of non-judicial power on state courts or to the conferral

¹¹ Administrative Appeals Tribunal Act 1975 (AAT Act), s 43.

of judicial power on state tribunals.¹² It might be expected, therefore, that the distinction between judicial review and merits review would find no place in state law. However, there are various state adjudicatory bodies – some called ‘tribunals’ and others called ‘courts’ – that exercise a mix of judicial review and merits review jurisdiction. In the state context, the concept of merits review is essentially similar to that developed by the AAT and the Federal Court at the federal level. In Australian law, at both federal and state level, merits review has come to be understood as describing a mode of administrative adjudication distinct and different from judicial review.

2.2 The Concept of Merits Review

The concept of merits review can be said to have three elements, which might loosely be called the substantive, the procedural and the remedial. The substantive element is encapsulated in the principle that the task of a merits reviewer is to ensure that the ‘correct or preferable’ decision is made.¹³ The procedural element is colloquially captured in the idea that the merits reviewer ‘stands in the shoes of the primary decision-maker’. The remedial element relates to the powers of the merits reviewer when it reviews a decision.

2.2.1 The Substantive Element of Merits Review

Although the Kerr Committee (perhaps unwittingly) invented the concept of merits review, it said very little about its nature beyond contrasting review on the merits with legality-based review. Similarly, the Administrative Appeals Tribunal Act 1975 (AAT Act) (like subsequent statutes modelled on it) contains no indication of the criteria according to which the AAT should exercise its various remedial powers. The ‘correct or preferable’ standard of merits review – which is a judicial invention¹⁴ – refers, in abstract terms, to norms of good decision-making departure from which triggers the remedial jurisdiction of the AAT and application of

¹² Indeed, the categorical distinction between judicial bodies (courts) and non-judicial bodies (tribunals) found in federal law is absent from state law.

¹³ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 68 (Bowen CJ and Deane J).

¹⁴ See previous note.

which underpins exercise by the AAT of its various remedial powers, and in particular the powers to vary a decision and to make a substitute decision. ‘Correct’ in this formula is taken to refer to situations in which the reviewer considers that there is only one acceptable decision; and ‘preferable’ refers to situations where it considers that there is more than one acceptable decision.

In an early decision of the AAT, its first President (Brennan J) said that ‘[t]here is no dichotomy between the administrative standards upon which the Tribunal must insist... and the principles of law which are applied by a court : administrative action which exceeds the power conferred is not only ineffective in point of law, but it constitutes unacceptable administrative conduct’.¹⁵ Thus, a merits reviewer may intervene if it considers that the primary decision was not the correct or preferable one as a result of procedural unfairness, or of some defect of reasoning – such as taking account of an irrelevant consideration or exercising a power for an improper purpose, or because the decision-maker made an error of law or fact, or because the decision was unreasonable. Because these are all grounds of judicial review as well as triggers for the exercise of the remedial powers of a merits reviewer, the question that inevitably arises is whether there are any substantive differences between judicial review and merits review. Three issues deserve some attention: review of government policy, review for error of law and review for error of fact.

2.2.1.1 Policy Review

In this context, policies are non-statutory decision-making norms. In Australian judicial review law, a decision may be illegal if it is based on a policy that is inconsistent with a rule of law, or on application of a policy without proper regard to the facts of the particular case,¹⁶ or on refusal to apply an announced policy without good reason.¹⁷ A decision may also be held illegal if it is based on a policy that the court considers to be ‘so unreasonable that no

¹⁵ *Re Brian Lawlor Automotive and Collector of Customs* (1978) 1 ALD 167, 177.

¹⁶ Policies, lacking the force of law, must be applied flexibly.

¹⁷ At least, without giving the affected person a chance to argue for the application of the policy.

reasonable decision-maker could apply it'. This is known as '*Wednesbury* unreasonableness', and it sets a very high threshold for judicial intervention. In Australian merits review law, it is clear that such defects may justify the conclusion that a decision is not the correct or preferable one. The more difficult question is whether a merits reviewer may intervene when the policy on which the decision is based, although not *Wednesbury*-unreasonable is, nevertheless, in the opinion of the reviewer, not the preferable one. In other words, how free is a merits reviewer to depart from government policy in deciding whether a decision is correct or preferable? The doctrine of the separation of judicial power is taken to permit courts to reject government policy only in extreme cases. However, merits reviewers exercise non-judicial, and not judicial, power, and this fact may be thought to support greater freedom in judging the merits of government policy.

Brennan J addressed such issues in one of the Tribunal's earliest decisions. The AAT's powers, he said, are wide enough to 'permit the sterilization or amendment of policy...in point of law, the Tribunal is as free as the Minister to apply or not to apply policy...[it] is at liberty to adopt whatever policy it chooses, or no policy at all'.¹⁸ On the other hand, Brennan J said, the Tribunal is essentially a 'curial', not an 'administrative' body,¹⁹ and its basic responsibility is to apply policy, not make it. 'The detachment which is desirable for adjudication', he added, 'is not in sympathy with the purposiveness of policy formation'.²⁰ In other words, although merits review tribunals are non-judicial bodies, because of their basically adjudicatory function, it is inappropriate for them to pronounce upon the merits of the policies on which decisions are based as opposed to the merits of the decision itself relative to those policies. In practice, Australian merits reviewers are no more willing than courts to question government policy. Indeed, in some of the Australian states,

¹⁸ *Re Drake and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 634, 642.

¹⁹ *Ibid*, 643.

²⁰ *Ibid*.

there are statutory provisions designed to limit the freedom of merits reviewers to depart from government policy.

2.2.1.2 Error of Law

In Australian law, ‘merits review’ has become a highly technical concept. However, there is also a less formal and more basic sense in which the ‘merits’ of a decision are contrasted with its ‘legality’. Legality is the province of judicial review while the merits (in this less formal sense) are the province of merits review. Theoretically, a decision that is lawful and, as a result, immune from judicial review, may nevertheless not be the correct or preferable one, in which case it might open to a merits reviewer to vary the decision or make a decision in substitution for it. Conversely, it might seem to follow that if a decision is unlawful, the question of whether it is the correct or preferable one would never arise: if a decision is illegal, whether it is good or bad is of no concern. So does a merits reviewer have jurisdiction to review an illegal (purported) decision and to set it aside on the ground that it is contrary to law (regardless of its merits)? This was one of the first questions that the AAT was required to answer; and the Tribunal’s decision that it did have such power²¹ established that although merits reviewers (unlike courts exercising judicial review jurisdiction) can review administrative decisions ‘on the merits’, this is not all they can do: they can also decide questions of law.²²

More generally, the AAT’s decision established that judicial review and merits review are, in their substantive dimension, overlapping rather than mutually exclusive functions.

Merits review, we might say, is enhanced judicial review in the sense that (any and all of) the norms of good decision-making departure from which can render a decision illegal can also

²¹ *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167; affirmed *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 2 ALD 1; reaffirmed *Secretary, Department of Social Security v Alvaro* (1994) 34 ALD 72.

²² However, merits review tribunals cannot answer questions of law ‘conclusively’, this being a judicial function. The exact meaning of this term is unclear, but its practical effect is that statements of law by merits review tribunals are a form of soft law.

prevent it being the correct or preferable decision. On the other hand, it does not follow from the fact that a decision is lawful that it is also the correct or preferable decision.

2.2.1.3 Error of Fact

This conclusion is best and most clearly illustrated by reference to errors of fact which, in the relevant sense, result from giving too little or too much weight to the available evidence. In general, in Australian law such errors do not provide a ground for judicial review, whereas failure to give appropriate weight to the evidence is one of the most important and common justifications for holdings by merits reviewers that the decision in question was not the correct or preferable one. Indeed, it has been said that one of the reasons why courts are relatively unwilling to review fact-finding by administrators is precisely that doing so is one of the prime functions of merits review tribunals.²³ Moreover, in those types of case in which courts will review decisions on questions of fact, the tests used to determine whether or not the decision is lawful tend to leave the decision-maker considerable discretion and to justify holdings of illegality only in extreme cases. By contrast, the ‘correct or preferable’ formula of merits review gives the reviewer much more freedom to reassess the evidence and its weight. We saw in 2.2.1.2 that merits reviewers appear just as unwilling as courts to review bureaucratic policy-making. By contrast, reviewing bureaucratic fact-finding is understood to be their core business.

We may summarise the discussion of the substantive element of merits review by saying that it is in the area of review of fact-finding that it differs most from judicial review and involves much greater external scrutiny of bureaucratic decision-making.

2.2.2 The Procedural Element of Merits Review

²³ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 340.

Central to the concept of merits review is the idea that the reviewer ‘stands in the shoes of the primary decision-maker’.²⁴ This colloquialism paraphrases statutory provisions that allow the reviewer to exercise (any and all of) the powers and discretions vested in the primary decision-maker and that deem the reviewer’s decision – when the reviewer varies the primary decision or makes a substitute decision – to be the decision of the primary decision-maker. These provisions mark a fundamental difference between merits review and judicial review. Whereas the main function of the judicial reviewer is to examine the decision for defects and to invalidate the decision if it is defective, the main function of the merits reviewer is to bring it about that the correct or preferable decision is made. Like the judicial reviewer, the merits reviewer may do this by affirming the original decision or remitting it to the primary decision-maker for reconsideration. But very commonly, the merits reviewer will achieve the required outcome by doing something that judicial reviewers typically have no power to do – namely varying the original decision or making a new decision in substitution for it. In doing so, the reviewer may exercise any relevant power available to the primary decision-maker whether or not the latter purported to exercise that power in making the original decision.

Nevertheless, despite its beguiling simplicity, the idea that the reviewer stands in the shoes of the primary decision-maker is complex and problematic. For one thing, when a merits reviewer affirms the primary decision or sets it aside and remits it to the primary decision-maker for reconsideration, the reviewer exercises a power of its own, not a power of the original decision-maker. More significantly, a tribunal typically has much more time and many more resources to devote to reviewing the decision than bureaucrats can typically devote to individual cases. Moreover, merits review is conducted not on the basis of the relevant facts as they were at the date the primary decision was made but on the basis of the relevant facts as at the date of review (in other words, the record remains open until the date

²⁴ *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139, 143 (Smithers J)

of review and the reviewer can receive new evidence that was not available to the primary decision-maker). Under certain circumstances, the merits reviewer can even take account of changes in the law since the original decision was made.

Unless used carefully, there is a danger that the shoe metaphor will blind us to such distinctions between primary decision-making and merits review, and cause ‘misunderstanding...between decision-makers...and reviewers’²⁵ based on lack of appreciation of the significant differences between the respective roles of the former and the latter.

2.2.3 The Remedial Element of Merits Review

As we have seen, a merits reviewer may affirm or vary the decision under review, or set the decision aside and either make a substitute decision or remit the decision to the primary decision-maker for reconsideration. In practice, the archetypal merits review remedy is to set the decision aside and make a substitute decision. Merits reviewers rarely remit decisions for reconsideration, and in principle should do so only if the reviewer considers that the primary decision-maker is in a better position than the reviewer to make the correct or preferable decision. By contrast, the archetypal judicial review remedy is setting aside and remittal to the primary decision-maker. This difference reflects the fact that courts are judicial bodies exercising judicial power while merits review tribunals are non-judicial bodies exercising non-judicial power. The power to make a decision in substitution for that of an executive officer or agency (as opposed to a lower court) is, in theory, a non-judicial power, and so could not (in principle, at least) be conferred on a court.²⁶

²⁵ S Hamilton, ‘The Future of Public Administration: The Future of Administrative Law’ in R Creyke and J McMillan (eds), *The Kerr Vision of Australian Administrative Law – At the Twenty-Five Year Mark* (Canberra: Centre for International and Public Law, 1998), 118.

²⁶ There is a right of appeal ‘on a question of law’ from the AAT to the Federal Court. Such an appeal is functionally equivalent to a judicial review application and engages the original, not the appellate, jurisdiction of the court. The Federal Court has no express power to make a decision in substitution for that of the AAT, and it rarely does so. Since 2005 it has had power to make findings of fact that are consistent with the findings of the AAT and, for that purpose, to admit new evidence. The constitutionality of these provisions, and of the Federal Court’s occasional practice of making a decision in substitution for that of the AAT, have not been tested.

In Australian federal law, an important difference between courts (judicial reviewers) and tribunals (merits reviewers) arises from the fact that the power to make enforceable decisions is considered to be judicial. It follows that tribunals, being non-judicial bodies, cannot be given the power to enforce their own decisions; and also that in enforcement proceedings before a court, the tribunal's decision must be 'reviewed' by the court.²⁷

2.3 Merits Review and Judicial Review

We can summarize the foregoing discussion by saying that because of the strong principle of separation of judicial power that the High Court has read out of (or in to) the Australian Constitution, there is a categorical distinction in Australian law between judicial review and merits review. This distinction is clearest in respect of what I have dubbed the procedural and remedial elements of merits review. The archetypal judicial review remedy is setting aside and remittal, while the archetypal merits review remedies are varying the decision and making a substitute decision. In dispensing the characteristic merits review remedy, the reviewer exercises by proxy powers available to the primary decision-maker, whereas in dispensing the characteristic judicial review remedy courts exercise inherent judicial power. Judicial review is typically based on the material available, to and the reasons for decision given by, the primary decision-maker, and on the law as it stood at the time the original decision was made.²⁸ By contrast, merits review can take account of material available at the time of review, even if it was not available at the time the decision was made, and of changes in the law since that time. Moreover, in reconsidering the decision, the merits reviewer is not limited to the powers actually exercised by the primary decision-maker or to the matters raised before or the reasons given by the primary decision-maker. The basic function of the judicial reviewer is the negative task of identifying any defects in the decision under review whereas the basic function of the merits reviewer is the positive task of bringing it about that

²⁷ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

²⁸ *Kavvadias v The Commonwealth Ombudsman (No 2)* (1984) 6 ALD 198, 206.

the correct or preferable decision is made. The merits reviewer is a decision *maker* in an important sense in which the judicial reviewer is not.

In what I have dubbed the ‘substantive’ respect, however, the relationship between the two modes of administrative adjudication is rather more complex. Because the basic task of the judicial reviewer is the negative one of determining whether the decision under review is defective in some sense (or, in other words, of policing limits on decision-making power) the ‘grounds’ of judicial review are expressed negatively – illegality, procedural unfairness, unreasonableness and so on – even though they imply positive criteria of good decision-making which judicial review can be thought of as promoting – legality, procedural fairness, reasonableness and so on. Although the function of the merits reviewer is positively to secure the correct or preferable decision, it is an implicit precondition of the exercise of the reviewer’s remedial powers that it decide whether or not the decision under review is the correct or preferable one. It cannot avoid this (negative) step in the review process because its power to affirm the decision can be exercised only if it is the correct or preferable one, and its other powers can be exercised only if the decision is not the correct or preferable one. In other words, the merits reviewer has the dual task of negatively deciding whether the decision under review is the correct or preferable one and, if it is not, of positively bringing it about that the correct or preferable decision is made.

Unsurprisingly, the criteria of good decision making that – in their negative form – are used to determine whether the merits reviewer should affirm the decision on the one hand, or vary it or set it aside on the other, are the very same criteria that inform the reviewer’s own process of making the correct and preferable decision (if it decides to vary the decision or make a substitute decision) and which should guide the primary decision-maker’s reconsideration of the decision (if the reviewer decides to remit the decision). As we have seen, the criteria of good decision-making that perform this dual function in merits

review are essentially similar to those implied by the negatively framed grounds of judicial review – legality, procedural fairness, reasonableness and so on. Judicial review and merits review promote similar bureaucratic values associated with good decision-making.

Nevertheless, the distinction between the ‘merits’ of a decision and its ‘legality’ is said to be central to the concepts of merits review and judicial review. Whereas judicial review is said to be limited to issues of legality, merits review (by definition) ‘goes to the merits’. Because the same foundational criteria of good decision-making are promoted by judicial review and merits review alike, the substantive distinction between legality and merits can be, at most, one of degree, not one of kind. Legality and merits are merely points on a continuum representing the degree to which bureaucratic compliance with norms of good decision-making is subject to external scrutiny and to which non-compliance with such norms is remediable.

3. The UK

In 19th-century England, non-judicial administrative adjudication was commonly undertaken within non-departmental, multi-functional agencies charged with responsibility for administering statutory programs of regulation and welfare.²⁹ Adjudicators ‘embedded’ in this way within agencies were seen, for various reasons, to be better suited than courts to resolving disputes between citizens and government. In the course of the century, the rule-making and administrative functions of many such agencies were transferred to government departments, leaving adjudication of disputes either to a court or to a non-judicial body. One effect of this process was to make more obvious the similarities between judicial and non-judicial administrative adjudicators (tribunals and courts). In short, tribunals and courts came to be understood as performing essentially similar functions.

²⁹ See generally C Stebbings, *Legal Foundations of Tribunals in Nineteenth Century England* (Cambridge: Cambridge University Press, 2006).

By the early 20th century the model of the free-standing, mono-functional administrative tribunal had become firmly established. In the 1920s and 1930s there were vigorous debates about the principles according to which the task of administrative adjudication should be allocated respectively to courts, tribunals and government agencies. Scholars such as William Robson³⁰ and lawyers such as Lord Chief Justice Hewart³¹ argued strongly in favour of external adjudicators. The Donoughmore Committee, by contrast, proposed a division of functions, primarily between courts (external) and departmental ministers (internal), on the basis of an unsatisfactory distinction between judicial, quasi-judicial and administrative functions, which was in turn based on a difficult contrast between law and policy.³² Only in exceptional cases were tribunals to be preferred to courts on the one hand and ministers on the other. A quarter of a century later, the Franks Committee reaffirmed the Donoughmore Committee's preference for courts over tribunals as external administrative adjudicators.³³ By this stage, the model of internal, embedded adjudication was more-or-less limited to public inquiries associated with the land-use planning process, where it continues to operate in a manner not dissimilar to adjudication within US agencies. So far as tribunals were concerned, the Franks Committee made the crucial conceptual move of asserting that they should properly be understood as part of the judicial process, not part of the administrative process. On this basis, the Committee's main concern was to ensure that tribunals displayed and promoted the (essentially judicial) procedural virtues of 'openness, fairness and impartiality'.

The association of tribunals with the judicial branch was taken a large step further by the Review of Tribunals chaired by Sir Andrew Leggatt. The provisions of the Courts, Tribunals and Enforcement Act 2007 (TCE Act) dealing with tribunals are based on the 2001

³⁰ *Justice and Administrative Law* (London: Macmillan, 1928). A 2nd edition was published in 1947 and a 3rd in 1951.

³¹ *The New Despotism* (London: Ernest Benn, 1929).

³² Report of the Committee on Ministers' Powers, Cmnd 4060 (1932).

³³ Report of the Committee on Tribunals and Enquiries, Cmnd 218 (1957).

report of the Review, *Tribunals for Users: One System, One Service*. A major thrust of these provisions is to reinforce the identification of tribunals with courts. For instance, legally-qualified members of tribunals are now called ‘judges’; a disparate collection of subject-specific tribunals are being amalgamated into a two-tier structure in which the main function of the Upper Tribunal is to hear appeals from the lower, First-tier Tribunal; and the Upper Tribunal has been given limited judicial review jurisdiction in addition to its appellate jurisdiction. It is not going too far to say that in this new regime, tribunals are effectively a species of court or, perhaps, that tribunals and courts are two species of the genus of adjudicator.

Tribunals, in one form or another, have been the subject of vigorous debate in the UK for the best part of two centuries. Nevertheless, discussion has tended to focus on procedure, the institutional aspects of administrative adjudication and the structure of the tribunal ‘system’. Much less has been said or written about what tribunals actually do or, in the language used earlier in this paper, about the juridical nature of non-judicial administrative adjudication. One of the catalysts for the development of the Australian concept of merits review was the establishment of a general (as opposed to a ‘specialist’ or subject-specific) administrative appeals tribunal (the AAT), which now has jurisdiction to review decisions made under more than 400 statutes covering a very wide range of government activities. Importantly, too, significant decisions of the AAT are reported, as are significant decisions of the Federal Court on appeal from the AAT. The TCE Act has now established such a tribunal in the UK, but the Act itself says very little about the juridical nature of the new tribunals’ tasks – indeed, it contains no provisions describing in general terms the function of the First-tier Tribunal in making initial decisions (although it does say something about its role when reviewing its own decisions). In relation to decisions of the First-tier Tribunal, the Upper Tribunal is, in some respects, cast in the role of a merits reviewer – for instance, it has the

power, on appeal, to make a decision in substitution for that of the First-tier Tribunal. In other respects, however, it is conceived as an appellate court – for instance, its jurisdiction is limited to points of law, and it has the power to make findings of fact.

It might be expected that the Upper Tribunal will, in the years to come, make significant contributions to our understanding of what UK tribunals do and how it relates to what courts do. In the meantime, however, since the jurisdiction of the new tribunals is constituted by transfer to it of the jurisdiction of existing subject-specific tribunals, we need to look at the legislation relevant to those particular tribunals and to decisions of those tribunals for an appreciation of pre-TCE Act understandings of the role of tribunals in the UK. Here I will deal with social security and immigration tribunals, which are two of the most important sets of tribunals in the UK system. The discussion is cast in terms that ignore the impact of the TCE Act.

Appeals to social security appeal tribunals are governed by s 12 of the Social Security Act 1998. This provision says almost nothing about the powers of the tribunal. However, the leading decision of the Social Security and Child Support Commissioners (SSCSCs) (the highest tribunal in the social security adjudication system) establishes that an appeal to a social security appeal tribunal is by way of a complete rehearing of issues of fact and law.³⁴ The ‘appeal tribunal is designed to be a superior fact finding body’.³⁵ Its basic task is to make what it considers to be the correct decision, and in doing so it ‘may make any decision which the officer below could have made’.³⁶ The ‘appeal tribunal’s jurisdiction is not limited to affirming [the decision under appeal] or alternatively setting aside the decision’ and remitting it to the decision-maker.³⁷ The tribunal ‘in effect stands in the shoes of the decision-maker’.³⁸

³⁴ SSCSC Case R(IB) 2/04. See also SSCSC R(IS) 17/04, [26].

³⁵ Ibid, [14].

³⁶ Ibid, [24].

³⁷ Ibid, [15]. By contrast, under s 120 of the Enterprise Act 2002 (UK) the Competition Appeal Tribunal, in hearing appeals from decisions of the Office of Fair Trading, the Secretary of State or the Competition Commission, may only quash the whole or part of a decision and refer the matter back to the original decision-

Moreover, its jurisdiction is ‘inquisitorial or investigatory’ in the sense that it may consider issues relevant to making the correct decision even if they are not raised by the parties to the appeal.³⁹ Unlike an Australian merits review tribunal, however, a social security appeal tribunal may not ‘take into account circumstances not obtaining at the time when the decision appealed against was made’.⁴⁰

It has also been held that because a social security appeal tribunal is a ‘purely judicial body’, it cannot entertain appeals against exercises of discretion that involve consideration of ‘non-justiciable’ issues. Any appeal against such a discretionary decision is limited to ‘points of law’ understood in terms of the grounds of judicial review.⁴¹ In principle, there is an important distinction here between a UK social security appeal tribunal and an Australian merits review tribunal. The main reason given by the Kerr Committee for classifying merits review as a non-judicial function was that the task of reviewing discretionary decisions would typically involve the consideration of ‘non-justiciable’ issues. The clear implication is that merits review tribunals would have the power to decide non-justiciable issues. In practice (as we have seen), the AAT takes a very cautious approach to reviewing the exercise of administrative discretions and government policy. Nevertheless, in principle the distinction between justiciable and non-justiciable issues does not mark the boundary of the AAT’s competence. Indeed, to the contrary, there is no technical bar to the AAT considering non-justiciable issues in the course of reviewing decisions. The substantive essence of merits review, in the Australian sense, is precisely that it extends beyond law and legality.

An appeal lies from a decision of an appeal tribunal to an SSCSC on a point of law. On appeal, if the decision is set aside, the Commissioner may make fresh or further findings

maker. In deciding appeals, the Tribunal is to ‘apply the same principles as would be applied by a court on an application for judicial review’.

³⁸Case R(H) 3/04, [25].

³⁹ Ibid, [31]-[32].

⁴⁰ Social Security Act 1998 (UK), s 12(8)(b).

⁴¹ SSCSC Cases R(H) 3/04 and R(H) 6/06.

of fact and make a substitute decision or, alternatively, refer the case back to the tribunal with directions for its determination.⁴² Decisions of the SSCSCs on matters of law are binding on appeal tribunals and on primary decision-makers. This reflects the fact that tribunals in the UK are understood to be exercising judicial power.⁴³ By contrast, binding precedent has no place in the Australian merits review system not only because merits review tribunals – at the federal level, at least – cannot conclusively decide questions of law (this being a judicial function),⁴⁴ but also because it is considered to be inconsistent with the basic task of such a tribunal – namely to bring it about that the correct or preferable decision is made in the individual case before the tribunal.

The understanding of the role of the SSCSCs as being judicial is also reflected in the fact that they ‘often’ set aside decisions because they are based on flawed reasoning and substitute a decision to the same effect but based on sound reasoning.⁴⁵ By contrast, in Australian merits-review law a sharp distinction is drawn between the decision and supporting reasoning. The task of the merits reviewer relates only to the decision. The remedial powers of the reviewer are not engaged by flawed reasoning unless it has led to the making of an incorrect decision.

Under s 82 of the Nationality, Immigration and Asylum Act 2002 (UK),⁴⁶ ‘where an immigration decision is made in respect of a person he may appeal to’ the Asylum and Immigration Tribunal (AIT), which is a first-tier reviewer staffed by ‘Immigration Judges’. As its name indicates, the AIT deals with both asylum and other immigration matters. The grounds of appeal are set out in s 84 of the 2002 Act. They fall into three categories: (a)

⁴² Social Security Act 1998 (UK), s 14(8). For an example of a case in which the SSCSCs refused to make findings of fact and referred the matter back see SSCSC Case R(IS) 17/04.

⁴³ On the concept of precedent as it applies to tribunals generally see T Buck, ‘Precedent in Tribunals and the Development of Principles’ (2006) 25 *Civil Justice Quarterly* 458.

⁴⁴ See n 22 above.

⁴⁵ D Bonner (ed), *Social Security Legislation 2007, Volume III: Administration, Adjudication and the European Dimension* (London: Sweet & Maxwell, 2007), 245, 247. This practice raises important and difficult issues, and its legitimacy may be open to question in the light of the decision in *Office of Communications v Floe Telecom Ltd* [2009] EWCA Civ 47.

⁴⁶ As amended by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

inconsistency with the Immigration Rules;⁴⁷ (b) inconsistency with domestic or EC law; and (c) incompatibility with rights under the European Convention on Human Rights (ECHR).

The AIT's powers are to 'dismiss' or 'allow' the appeal. The grounds on which an appeal can be allowed are (1) that the decision was not in accordance with the law (including the immigration rules) and (2) that a discretion exercised in making the decision should have been exercised differently. In addition to the ECHR, domestic and EC law, and the Immigration Rules, immigration decision-making is also regulated by extra-statutory 'policies' under which immigrants may be allowed to enter the UK even if not entitled to do so by any of the first three categories of provision. By statute, the AIT has no power to review an exercise of discretion under a policy if the decision in question is in accordance with the Rules. In other words, discretionary application, non-application or misapplication of an extra-statutory policy is not a ground of appeal, although such conduct may be relevant in deciding whether some other ground of appeal (such as unlawfulness or incompatibility with a Convention right) has been made out.⁴⁸

It follows from this rule about review of discretions exercised outside the Immigration Rules that the basis on which the AIT may allow appeals on the basis of application, non-application or misapplication of departmental policies is the same as that on which a court, conducting a judicial review, may quash a decision for a policy-related reason, namely, that application or non-application of the policy, or the way the policy was applied was inconsistent with some legal rule or principle. Unlike the AAT, the AIT may not – even in theory – consider the merits of the policy. Only if a policy is in 'absolute terms' that leave the decision-maker with no discretion or where, 'on the facts of the case there is no proper opportunity, by application of the policy, to make a decision unfavourable to the claimant',⁴⁹

⁴⁷ The Immigration Rules are a form of soft law, although not as soft as departmental 'policies'.

⁴⁸ *AG and others (policies; executive discretions; Tribunal's powers) Kosovo* [2007] UKAIT 00082, [44].

⁴⁹ *Ibid*, [48].

can the AIT allow an appeal on the ground of non-application or misapplication of the policy (and in such circumstances, the basis of the AIT's decision would be unlawfulness).

The characteristic function of the AIT is to decide, on the basis of a full reconsideration of the facts,⁵⁰ whether either of the grounds on which an appeal can be allowed has been established. Although the AIT's power is to 'allow' or 'dismiss' the appeal, in practical terms the effect of allowing an appeal will typically be substitution of a decision in favour of the appellant. However, the AIT may remit the matter for reconsideration by the primary decision-maker.

The task of the AIT, when deciding appeals alleging incompatibility with Article 8 of the European Convention on Human Rights (ECHR), was considered by the House of Lords in *Huang v Secretary of State for the Home Department*.⁵¹ That task, the House said, was not a secondary, reviewing, function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety. The appellate immigration authority must decide for itself whether the impugned decision is lawful and, if not, but only if not, reverse it.⁵²

The House went on to contrast the role of the appellate immigration authority (for present purposes, the AIT) with that of a court reviewing a decision on the ground of incompatibility with Art 8 of the ECHR. Such review requires the court (like the AIT when deciding an appeal on this ground) to determine the legality of a decision by applying a test of proportionality, as opposed to the less intrusive test of *Wednesbury* unreasonableness. The House quoted a statement to the effect that although more intrusive than the unreasonableness test, the proportionality test does not require the court to engage in 'merits review'.⁵³ This

⁵⁰ Eg *AA v Entry Clearance Officer (Nigeria)* [2004] IKIAT 00019, [5].

⁵¹ [2007] 2 AC 167.

⁵² *Ibid*, [11].

⁵³ For an early explicit recognition in the UK of the distinction between review for legality and merits review see Committee of the JUSTICE-All Souls Review of Administrative Law in the United Kingdom, *Administrative Justice: Some Necessary Reforms* (Oxford: Clarendon Press, 1988), 211-12.

was interpreted to mean that in applying the proportionality test, the court does not act as a ‘primary decision-maker’ with the task of deciding what decision ought to have been made; rather it reviews the decision of another decision-maker. By contrast, in exercising its appellate function the AIT does not review the decision of another decision-maker but rather decides ‘whether or not [the decision] is unlawful...on the basis of up to date facts’.⁵⁴ Moreover, like the AAT, the AIT is ‘much better placed [than the primary decision-maker] to investigate the facts’.⁵⁵

Like appeals to the AIT on the ground of incompatibility with Art 8 of the ECHR, asylum appeals are also decided on this basis of the facts as they are at the time of the appeal. By contrast, immigration (as opposed to asylum) appeals are generally dealt with on the basis of the facts as they were at the time of the decision appealed against.⁵⁶ In this respect, an appeal to the AIT is, in some cases, functionally equivalent to judicial review and in others to merits review as understood in the Australian system.

Like the SSCSCs, the AIT can make binding decisions on questions of law. In asylum cases the AIT has also developed a practice of issuing ‘country guidance’.⁵⁷ The purpose of such guidance is to promote consistency and efficiency in decision-making by the AIT. It is formulated by senior judges of the tribunal in the context of a particular appeal that raises issues common to a significant number of cases coming before the tribunal and as a by-product of deciding the appeal. Country guidance purports to provide authoritative factual information, relevant to deciding asylum appeals, about conditions in a particular country. Although country guidance has been described as ‘factual precedent’,⁵⁸ it is better understood

⁵⁴ Ibid, [13].

⁵⁵ Ibid, [15].

⁵⁶ *R v Immigration Appeal Tribunal, ex parte Rajendrakumar* [1996] Imm AR 97.

⁵⁷ R Thomas, ‘Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom’ (2008) 20 *International Journal of Refugee Law* 489.

⁵⁸ *S v Secretary of State for the Home Department* [2002] INLR 416, 435 (Laws LJ).

– as the word ‘guidance’ implies – as establishing relevant considerations to be taken into account by Immigration Judges in deciding individual asylum appeals.

The phenomenon of factual guidance (which, it seems, is not limited to the asylum context, and apparently has the approval of both the higher judiciary and the government) has very significant implications for understanding the role of tribunals – especially second-tier tribunals. In Australia, country information is provided to tribunals either by the executive or by research units within a tribunal itself. By contrast, the AIT has no information-gathering resources of its own and is dependent on the parties to a ‘country guidance appeal’ to provide relevant information. Moreover, as in the normal asylum appeal, the burden of proof in relation to such information rests on the appellant. In Australia country information is treated as an input to the tribunal decision-making process lacking any authoritative status. In the UK, by contrast, country guidance constitutes an authoritative (though not strictly binding) output of the process. Acceptance that tribunals (unlike courts) may appropriately make authoritative general statements of fact (as opposed to law) is apparently based on the assumption that tribunals have relevant ‘expertise’ (that courts lack); and it suggests a very different understanding of the role of tribunals from that prevalent in Australia (for instance). This assumption of expertise may also encourage the view that in supervising tribunals, courts should show heightened deference by interpreting the concept of an appealable ‘error of law’ very narrowly.⁵⁹

A party to an appeal to the AIT may apply to a court (in England, the High Court), on the ground that the AIT made an error of law, for an order requiring the AIT to reconsider its decision.⁶⁰ A party may appeal from the reconsidered decision to a court (in England, the Court of Appeal) on a point of law.⁶¹ On that appeal, the court may (*inter alia*) affirm the

⁵⁹ R Carnwath, ‘Tribunal Justice – A New Start’ [2009] *Public Law* 48, 56-64.

⁶⁰ Nationality, Immigration and Asylum Act 2002, s 103A. But ‘decision’ for these purposes does not include ‘procedural, ancillary or preliminary decisions’.

⁶¹ *Ibid*, s 103B.

decision, make any decision the AIT could have made or remit the case to the AIT. In substantive terms, such an appeal is functionally equivalent to judicial review and in remedial terms, functionally equivalent to merits review in the Australian sense of those terms.

This brief consideration of the respective functions of social security and immigration Tribunals shows that UK law embodies a significantly less clear, uniform and developed understanding of the role of tribunals than that found in Australian law. It remains to be seen what effect the creation and operation of the First-tier and Upper Tribunals will have on the juridical concept of administrative adjudication. For instance, it is unclear whether and how the practice of giving factual guidance will prove to be reconcilable with the limitation of appeals to the Upper Tribunal to points of law, especially if courts interpret the concept of ‘law’ narrowly in order to maximise the freedom of ‘expert’ tribunals from judicial control.

4. The US

Basic to an analysis of the role of ALJs and AJs in the US system is the fact that traditionally and typically, they are embedded within the agencies whose decisions they review. The modern history of administrative adjudication in the US is commonly traced back to the establishment of the Interstate Commerce Commission (ICC) in 1887, which was a non-departmental regulatory agency.⁶² To understand this history it is necessary, first, to distinguish between two senses of the word ‘adjudication’. The first is that adopted in this paper – namely resolution of disputes between citizen and government. The second meaning is that adopted in the Administrative Procedure Act 1946 (APA), which contrasts adjudication with ‘rule-making’. In this sense, adjudication – like rule-making – is a procedure for making ‘law’ or ‘policy’ of general application, but one that differs from rule-making in that it involves making law or policy in the context of and incidentally to deciding individual cases: adjudicatory as opposed to legislative policy/law-making. From the

⁶² Classic accounts of the early history are J Landis, *The Administrative Process* (New Haven and London: Yale University Press, 1938) and RE Cushman, *The Independent Regulatory Commissions* (New York: Oxford University Press, 1941).

establishment of the ICC until the 1960s adjudication in this latter sense – that is, making case-by-case decisions about applications for licences, enforcement proceedings against individuals, and so on – was the chief method by which regulatory agencies in the US performed their regulatory functions: the decision of individual cases and the making of general policy were integrated into a single process. Technically, the power of decision in the individual case resides in the agency (ie the head of the agency). But from early on, as the volume of work increased, the ICC began⁶³ delegating the fact-finding element of the decision-making process to officials who were originally called ‘hearing examiners’ and later ‘administrative law judges’. The basic idea was that a ‘factual record’ would be generated by a court-like process and would form the basis for a decision by the agency whether, for instance, to issue a licence or impose a penalty. In time, it became increasingly common for the whole decision-making process to be delegated in the first instance to a hearing examiner, subject to review by or appeal to the agency. This is the model of adjudication embodied in the APA.

There were two important developments of present relevance in the decades following the enactment of the APA. One was the expansion of mass social security programs and the other was a wholesale shift by agencies from adjudication to rule-making as the preferred mode for making policy (and law). The second of these developments greatly reduced the importance of adjudication in the policy-making process, while the first greatly increased the incidence of adjudication in the sense of resolution of disputes between citizen and government. Although decisions about entitlement to social security benefits were technically made by the Social Security Administration (SSA), in practice they were initially made by officers in local social security offices.⁶⁴ The task of reviewing contested decisions was

⁶³ At first informally but after 1906 with statutory authority.

⁶⁴ The APA scheme, under which the initial decision is made by an ALJ subject to review by or appeal to the agency, only applies to decisions which, by statute, are required to be made after a ‘hearing on the record’. Typically, social security benefit decisions do not have to be made in this way.

delegated by the SSA to ALJs, subject to review by or appeal to the agency. At the time when the APA was enacted, most ALJs were engaged in adjudication in regulatory contexts, where it was understood as a mode of policy-making. By the 1980s most non-judicial administrative adjudicators were engaged in adjudication in contexts, such as social security and immigration, where it functioned as a mode of reviewing primary decisions made by front-line officials.

To the outside observer of the US system, it is striking that administrative adjudication – in the sense of review of primary administrative decisions – is commonly undertaken by officials employed by the agency responsible for making the decisions being reviewed.⁶⁵ This arrangement is explicable by the fact that administrative adjudication in the US originated as an integral part of the process of making regulatory policy in the context of dealing with individual cases and only later became predominantly a mode of resolving disputes between citizen and government by reviewing initial decisions. As we saw earlier, in 19th-century England resolution of disputes arising out of implementation of statutory programmes was similarly ‘embedded’ within multi-functional, non-departmental agencies. However, dispute resolution in this context was not understood as part of the policy-making (let alone the law-making) process. This helps to explain why the shift of implementation from non-departmental agencies to departments in England was not accompanied by a similar shift of adjudication. From the start, administrative adjudication in England was understood as essentially judicial in nature whereas in the US it started life as a component of the administrative process.

Although the APA established a scheme of internal separation of powers within agencies in order to limit control by the agency of the making of individual decisions and to establish the ‘independence’ of adjudicators, none of the many and various proposals to

⁶⁵ In some cases, however, reviewing officials are employed by a different agency. For instance, review of immigration decisions is undertaken by officials employed by the Department of Justice, not the Immigration and Naturalization Service (INS).

establish an separate ‘corps’ of adjudicators or to create an administrative court, external to the agencies whose decisions were under review, has borne fruit – at the federal level, anyway. By contrast, as we have seen, the basic model of the administrative tribunal in the UK and Australian systems is that of a free-standing, external reviewer of decisions made by a government department or agency from which the tribunal is more or less ‘independent’ and separated. It is only in the context of the land-use planning system in the UK that the model of embedded adjudication continues to operate.

On the other hand, the basic US understanding of what embedded administrative adjudicators do is closer to the UK understanding than to the Australian – and this despite the fact that the formal separation of powers embodied in the Australian Constitution mirrors that embodied in the US Constitution. In Australia, tribunals and courts are understood to be categorically different types of institution, and merits review is understood to be categorically different from judicial review, the former being a non-judicial function and the latter a judicial function. By contrast, in the UK tribunals and courts are understood to be essentially similar institutions performing an essentially similar function. Likewise, in the US, although the typical administrative adjudicator is embedded within an agency forming part of the executive branch of government, administrative adjudicators (and hence, in respect of their adjudicatory functions, agencies) are understood to be exercising judicial power delegated to them by Congress – even if not ‘the judicial power of the United States’.⁶⁶ As (now) in the UK, non-court administrative adjudicators in the US are typically called ‘judges’ whereas in Australia they are called tribunal ‘members’. This difference between the US and the Australian understandings of the nature of tribunals and non-judicial administrative adjudication reflects respectively different interpretations of separation of powers by the US Supreme Court and the High Court of Australia.

⁶⁶ *Federal Maritime Commission v South Carolina Ports Authority* 535 US 743; 122 S Ct 1864 (2002)

As a result of the institutional structure of non-judicial administrative adjudication in the US, discussion of the role of non-judicial administrative adjudicators typically focuses on the relationship between adjudicators and agencies (ie agency heads) rather than on that between the adjudicator and primary decision-makers. Put differently, the nature of non-judicial administrative adjudication is understood more in terms of the role of agencies in reviewing decisions of ALJs⁶⁷ than in terms of the role of ALJs in making or reviewing initial decisions. In the model of administrative adjudication that underlies the provisions of the APA, the characteristic function of the ALJ is to develop a factual record on the basis of which the agency can decide relevant issues of law and policy. It is true that unless ‘the agency requires...the entire record to be certified to it for decision’, the ALJ has power to make an initial decision; but the agency has power to review that decision *de novo* either on its own motion or in response to an appeal.⁶⁸ As has been noted, the APA model of administrative adjudication focuses on regulatory decision-making – licensing, enforcement and so on – rather than on decision-making about entitlement to welfare and other benefits. In this APA model, administrative adjudication is understood as the fact-finding stage of a single, integrated decision-making process. By contrast, as I have defined it in this paper, administrative adjudication is understood in terms of review of a decision made by a primary decision-maker (to whom decision-making power has been delegated by the agency). This is now the dominant mode of adjudication in the US, and it is with the nature of this activity that this paper primarily deals.

Although there is little explicit discussion in the US literature of the juridical nature of function of administrative adjudicators in reviewing contested primary decisions, it seems clear that the role of the adjudicator is to undertake a *de novo* review of the initial decision and to decide whether the original decision should be affirmed, varied or set aside and

⁶⁷ And of courts in reviewing decisions of agencies.

⁶⁸ APA, s 557(b).

replaced by a substitute decision. That role is elaborated primarily in terms of developing a factual record, and the characteristic of *de novo* review (as opposed to an appeal) is that the record ‘remains open’ until the reviewer completes the review process. In Australian terms, *de novo* review is undertaken on the basis of material available to the reviewer at the time of the reviewer’s decision, not on the more limited basis of material available at some earlier time. Under the APA, if and when an agency reviews a decision by an ALJ, the agency ‘has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.’⁶⁹ In other words, agency review is merits review in the procedural sense. In the APA model, the main purpose of agency review is to enable the agency to exercise control over ‘policy’ by having the last word (subject to judicial review) on issues of statutory interpretation and the development, application and interpretation of extra-statutory decision-making norms. In crude terms, the APA establishes a division of labour between ALJs and agencies, the latter being responsible for fact-finding and the former for law and ‘policy’.

However, the respects in which this last statement is too ‘crude’ are significant. First, although the prime responsibility of ALJs is for fact-finding, the power to make an initial decision that, in the absence of review, stands as the decision of the agency, necessarily imports the power (and the duty) to decide relevant issues of law and ‘policy’. However, just as Australian merits reviewers cannot conclusively decide questions of law, so (it is said) the principle of *stare decisis* does not apply to decisions of ALJs. In other words, decisions by ALJs on issues of law do not create precedents that are binding on ALJs or primary decision-makers. In this respect, the most that can be said of ALJs (as of Australian merits review tribunals) is that they have a legal obligation of consistency in decision-making both in relation to their own earlier decisions and in relation to decisions of other ALJs (and of their

⁶⁹ Ibid. In the APA model, the power of initial decision resides in the agency, and ALJs make initial decisions as delegates of the agency.

agency when reviewing decisions by ALJs). Regarding ‘policy’ – in the sense of extra-statutory norms – the role of the ALJ is defined by the fact that although ALJs are understood as performing essentially judicial tasks, they are embedded within agencies and their decisions are ultimately subject to *de novo* review by the agency. This underpins the proposition that the function of ALJs is to apply and give effect to extra-statutory policies developed by the agency. Whereas the AAT (at least in theory) has power to question and to act inconsistently with government policy, ALJs are understood to have no such power.

The APA model assumed that any particular agency would undertake a relatively small number of adjudications, and that it would be practicable for agencies to control the ‘policy’ element of initial decisions by reviewing individual decisions by ALJs. However, the enormous increase since the 1950s of administrative adjudication in areas such as immigration and social security made it impractical for agencies in this way to police compliance by adjudicators with agency policy. The large volume of adjudications in such areas also made it impractical for agencies to control policy through an internal mechanism for review of ALJ decisions by a second-tier reviewer (such as the Appeals Council in the social security context). An alternative strategy was to make rules that legally bound ALJs and to establish extra-statutory norms to guide their decision-making. In the 1970s and early 1980s the social security administration utilised various other management techniques (such as performance monitoring), but these were eventually abandoned in the face of opposition from ALJs.

In this area of policy review we find a fundamental difference – in principle anyway – between administrative adjudication in the US and merits review by the AAT in Australia. Although the AAT is technically part of the executive branch, its ethos is essentially judicial. The institutional separation of the AAT from the agencies whose decisions it reviews and its status as an ‘external’ reviewer provide the foundation for this assertion of ‘independence’.

Ironically, however, the judicial ethos of the AAT explains not only why it technically has the power to question government policy but also why, in practice, it is very unwilling to do so. Nevertheless, there is a significant contrast between the AAT and the specialist merits review tribunals in the areas of social security and immigration (for instance). The latter – and especially the immigration tribunals – although technically ‘external’ reviewers of agency decisions, understand their role primarily in terms of the just and consistent implementation of agency policy in individual cases. In this respect, there is a closer analogy between the specialist Australian tribunals and US administrative adjudicators than between the latter and the AAT. The role of US adjudicators as implementers of agency policy is reinforced by their embedded location within agencies. Although ALJs are understood to be exercising an essentially judicial function, their administrative ethos distinguishes them not only from Article III (constitutional) courts but also from Article 1 (legislative) courts.⁷⁰

Fact-finding is central to the APA model of administrative adjudication, and the concept of a ‘hearing on the record’ provides the trigger for the application of the APA to administrative adjudication – the APA applies only if some other statute requires a hearing on the record.⁷¹ The prime function of the ALJ when reviewing primary decisions is to develop the record of the decision under review by an inquisitorial fact-finding process. So long as the record remains open to development the administrative decision-making process continues.

In principle, when and if an agency reviews a decision of an ALJ it can develop the record in the same way as the ALJ can. However, in practice, agency review is typically undertaken on

⁷⁰ CH Koch, ‘Policymaking by the Administrative Judiciary’ (2005) 56 *Alabama Law Review* 693; JE Moliterno, ‘The Administrative Judiciary’s Independence Myth’ (2006) 27 *Journal of the National Association of the Administrative Law Judiciary* 53; A Scalia, ‘The ALJ Fiasco – A Reprise’ (1979-80) 47 *University of Chicago Law Review* 58, 61-2.

⁷¹ The APA (ss 554, 556 and 557) lays down a set of trial-type procedures for hearings on the record. Administrative adjudication to which the APA does not apply is generically known as ‘informal adjudication’. However, ‘adjudication’ in this phrase has a much wider meaning than that adopted in this paper, covering primary decision-making as well as review. Informal adjudication affecting ‘liberty’ and ‘property’ interests is subject to constitutional due process requirements that typically fall short of those applicable to a hearing on the record under the APA. The APA requires a hearing before the decision in question is made, whereas due process may be satisfied by a post-decision hearing (by way of review of the decision). See generally Strauss, *Administrative Justice in the United States*, 2nd edn (Durham, NC: Carolina Academic Press, 2002), 199-218.

the basis of the record developed by the ALJ; and factual issues at this stage normally concern inferences to be drawn from the facts rather than the primary facts themselves. Whether administrative adjudication is undertaken by an ALJ or by the agency itself, the decision is technically that of the agency; and when a court reviews a decision of an administrative adjudicator, technically it reviews a decision of an agency, regardless of who actually made the decision.

A problem may arise where an agency reaches a different factual conclusion than that reached by an ALJ.⁷² Although the power to decide factual issues ultimately resides in the agency, the main function of the ALJ is to find the facts.⁷³ Under the APA, the relevant test to be applied by a court in judicially reviewing a decision of an agency is whether the decision is supported by ‘substantial evidence’ taking into account ‘the whole record’ of the hearing.⁷⁴ The ALJ’s decision will, of course, be part of the record. As a result, in practice the formal freedom of an agency to reject findings of fact by an ALJ is – to some undefined extent – constrained by the requirement that the ALJ’s decision be given some weight. Moreover, to the extent that the disagreement between the agency and the ALJ relates to factual inferences rather than primary facts, the ability of the agency to develop policy by resolving the disagreement in a particular way may be limited. Although the formal task of ALJs in relation to agency policy is implementation, the limited freedom of agencies to disagree with ALJs about the proper inferences to be drawn from agreed facts may confer on ALJs a degree of *de facto* power to develop policy without interference from their agencies.⁷⁵

⁷² In high-volume areas an intermediate review body may be established, the decisions of which, like those of ALJs, are technically decisions of the agency. Factual disagreements between an ALJ and an internal review body may give rise to the same problem.

⁷³ SG Breyer, RB Stewart, CR Sunstein and A Vermeule, *Administrative Law and Regulatory Policy: Problems, Text and Cases*, 6th edn (New York: Aspen Publishers, 2006), 214-5; JL Mashaw, RA Merrill and PM Shane, *Administrative Law: The American Public Law System, Cases and Materials*, 5th edn (St Paul, MN: Thomson West, 2003), 830-838.

⁷⁴ Fact-finding in cases of ‘informal adjudication’ not falling within the APA is reviewed under an ‘arbitrary and capricious’ standard: *Citizens to Preserve Overton Park, Inc v Volpe* (1971) 401 US 402; PL Strauss, *Administrative Justice in the United States*, 348-9.

⁷⁵ I am grateful to Jerry Mashaw for discussion on this point.

As in the case of administrative adjudication in the US, fact-finding lies at the heart of the Australian concept of merits review. Like ALJs, the AAT and other merits review tribunals have the power to develop the record – in other words, merits review is based on material available at the time of review whether or not it was available to the original decision-maker. In the Australian system, merits review of a decision of a first-tier merits review tribunals by a second-tier tribunal extends to findings of fact by the first-tier tribunal; but findings of fact by merits review tribunals (whether first or second tier) cannot be reviewed by the decision-making agency. The power of US agencies to review factual decisions by ALJs marks a significant difference between administrative adjudication as understood in the US and the Australian concept of merits review.

5. Conclusion

The main aim of this paper has been to develop an account of what ‘tribunals’ do that can provide a counterpart to existing, highly-developed and theorised accounts of what courts do when they engage in ‘judicial review’ of bureaucratic decision-making. I have used the Australian concept of ‘merits review’ as the starting point for this project because, for various reasons, Australian federal law embodies a much more explicit and hard-edged account of non-judicial review of administrative decision-making than the law of either the UK or the US. In Australia, tribunals are categorically different from courts, and what tribunals do – merits review – is categorically different from what courts do – judicial review – when they entertain challenges by citizens to government decisions that adversely affect them. However, to say that judicial review and merits review are categorically different is not to say that they are entirely dissimilar. For instance, both are concerned with enforcing the legal limits of decision-making powers; and neither concerns itself with the desirability of government policy, except in extreme cases.

At the risk of oversimplification, we can identify three of the differences, between the Australian concepts of merits review and judicial review, as perhaps the most significant. First, the characteristic judicial review remedy is setting aside of the decision and remittal to the primary decision-maker for reconsideration, whereas the characteristic merits review remedy is setting aside of the decision and the making of new decision in substitution for it. Secondly, the main focus of judicial review is on issues of ‘law’ and the ‘legality’ of the decision, whereas the main focus of merits review is on issues of ‘fact’ and the evidentiary foundation of the decision. Thirdly, the characteristic function of a court undertaking judicial review is the negative one of scrutinizing the decision for defects whereas the characteristic function of a merits review tribunal is the positive one of making the correct or preferable decision.

In the UK, to the extent that there exists a general understanding of what tribunals do – as opposed to an understanding of what particular tribunals do – it is couched in terms of a distinction between ‘appeal’ and ‘review’: courts review bureaucratic decisions whereas tribunals hear appeals from administrative decisions. ‘Appeal’ in this context is understood to cover both law and fact, and ‘allowing’ the appeal effectively involves making a substitute decision in favour of the appellant. Courts also exercise appellate jurisdiction, and this explains why courts and tribunals are understood to perform an essentially similar function. Because of the lack of a strong separation of powers, there is no bar in UK law – as there is in Australian law – on courts entertaining appeals from decisions of the executive branch of government; and this reinforces the functional association between tribunals and courts. However, control by appellate courts of fact-finding by trial courts and bureaucrats is generally be less intense than control by tribunals of fact-finding by bureaucrats.

Moreover, the position has been greatly complicated by the creation of the Upper Tribunal. The general understanding, that tribunals exercise a broad appellate jurisdiction

covering both fact and law, may provide the basis for an account of what the First-tier Tribunal does (and of what the Upper Tribunal does in those cases in which it acts as a first-tier tribunal); but it will not fit the Upper Tribunal, the appellate powers of which are limited to points of law, and which also has (limited) judicial review jurisdiction. On the other hand, as we have noted, when hearing appeals from decisions of the First-tier Tribunal the Upper Tribunal has the power to make a substitute decision. It is, I think, very uncertain whether the appellate function of the Upper Tribunal will be understood and developed as a form of broad, second-tier tribunal appeal or as a relatively narrow mode of judicial review. It also remains to be seen whether the Upper Tribunal and the Court of Appeal will develop a unitary concept of the tribunal function analogous to the Australian concept of merits review. In Australia, the general concept of merits review applies regardless of the subject matter of the decision under review; and it also equally describes the role of second-tier and first-tier reviewers.⁷⁶

Uncertainty about how UK law will develop is partly a function of the fact that the TCE Act regime is very new, but also of the fact that historically, the jurisdiction of the typical tribunal was limited to decisions made in implementation of a particular statutory regime. In this sense, it was a ‘specialist’, not a ‘generalist’ adjudicatory body. In the US, administrative adjudication is similarly organised along specialist lines. However, the APA embodies a general model of ‘adjudication’ on the basis of which a unitary understanding, of what ‘tribunals’ do, can be built. The core of that understanding is *de novo* reconsideration of decisions, focusing on the facts and keeping the record open until the reviewer decides to affirm the decision or to make a substitute decision.

It would seem, then, that making due allowances for the many differences between the position in our three comparator jurisdictions, two elements are common to all

⁷⁶ Thus, when the AAT reviews the decision of a first-tier merits review tribunal, it conducts a full review of that decision on the merits.

understandings of what tribunals do: (1) full reconsideration of the facts of individual cases, commonly on the basis of all relevant material available to the reviewer and (2) the power to make a decision in substitution for the decision under review. The high intensity of review of fact-finding characteristic of tribunals contrasts not only with the approach by courts to judicial review of bureaucratic decision-making but also with the typical judicial approach to controlling fact-finding by inferior courts. When the Kerr Committee said that judicial review needed to be supplemented by general provision for ‘review on the merits’, what they primarily meant by ‘the merits’ (it seems) were ‘the facts’.

If my conclusion – that the characteristic function of tribunals is intense review of fact-finding – is correct, many questions suggest themselves. For instance: why should fact-finding by bureaucrats be subject to more intense scrutiny than fact-finding by inferior courts? Why should this task be thought unsuitable for courts? What equips tribunals to undertake a task that courts do not? Is intense scrutiny of fact-finding more appropriate or necessary in relation to some than other categories of government decisions? If we understand ‘merits review’ by tribunals as an enhanced form of ‘judicial review’ by courts, why has the former not superseded the latter? And so on. As the comparative analysis in this paper has demonstrated, the answer to each of these questions (all of which raise fundamental issues of institutional design) is likely to vary from one jurisdiction to another. I hope that the analysis has also shown the value of supplementing the understandable and justifiable focus of administrative law scholarship on courts and judicial review with a careful look at tribunals, their functions and their place amongst the institutions of government.